SUPREME COURT APPEAL FOR STIPE GOSSETT STIPE

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No. 82-789

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES D. WILKETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

John B. Estes
Counsel of Record

Gene Stipe
Mitchell A. Lee
Stipe, Gossett, Stipe, Harper & Estes
2915 North Lincoln
P.O. Box 53567
Oklahoma City, Oklahoma 73152
(405) 524-2268

Attorneys for Petitioner

I.
QUESTIONS PRESENTED FOR REVIEW

1. Where the prosecution is directed by a pretrial order to produce all exculpatory evidence to the defendants, can the appellate court circumvent the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), by condoning the production of *Brady* material by the government after the trial has proceeded some length in order to preclude the defendants from reurging pretrial severance motions pursuant to Rule 14 of the Federal Rules of Criminal Procedure.

2. Where the District Court has determined that more than one conspiracy exists, and severs some of the defendants, can the appellate court circumvent this Court's holdings in *Kotteakos v. United States*, 328 U.S. 750 (1946) and *Berger v. United States*, 295 U.S. 78 (1935), by determining that only one conspiracy did in fact exist.

TABLE OF CONTENTS

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 2

A. Procedural Background 2

B. Relevant Facts Concerning the Petitioner's Conviction for Conspiracy 3

EXISTENCE OF JURISDICTION BELOW 5

REASONS FOR GRANTING THE WRIT 5

I. THE TENTH CIRCUIT'S DECISION UPHOLDING THE TRIAL COURT'S REFUSAL TO GRANT PETITIONER'S REQUEST FOR A MISTRIAL IS IN CONFLICT WITH THIS COURT'S DECISIONS 5

II. THE TENTH CIRCUIT'S AFFIRMATION OF THE TRIAL COURT'S REFUSAL TO DISMISS THE CASE AGAINST THE PETITIONER DUE TO A PREJUDICIAL VARIANCE IS IN CONFLICT WITH THIS COURT'S DECISIONS 8

CONCLUSION 11

APPENDIX

A- Opinion of the United States Court of Appeals for the Tenth Circuit 1a

TABLE OF AUTHORITIES

Cases: Page

Brady v. Maryland,
373 U.S. 83 (1963) 3,4,5, 6,7,11

Kotteakos v. United States,
295 U.S. 78 (1935) 5,9,11,

United States v. Alberico,
604 F.2d 1315 (10th Cir. 1979),
cert. denied 444 U.S. 992 (1979) 7

United States v. Butler,
494 F.2d 1246 (10th Cir. 1974) 8

Federal Statutes:

Title 21 U.S.C. Section 841(a)(1) 2,3,5

Title 21 U.S.C. Section 846 2,3,5

Title 28 U.S.C. Section 3500 6

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The Petitioner, JAMES D. WILKETT, requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on September 9, 1982.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit was directed to be published, and will shortly appear in the Federal Reporters series. It appears in Appendix A to this petition. No opinions were rendered by the trial court.

JURISDICTION

The petitioner is seeking a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in order to review a judgment entered on September 9, 1982. No Petition for Rehearing was filed. Jurisdiction is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. United States Constitution, Amendment V, provides, in pertinent part that a person shall not:

> "Be deprived of life, liberty or property, without due process of law..."

2. Rule 14 of the Federal Rules of Criminal Procedure which states:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant severance of defendants or provide whatever relief justice requires."

3. Title 21 U.S.C. Section 841(a)(1) which states:

> "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> (1) To manufacture, distribute, or dispense, or possess with intent to manufacture, dispute, or dispense, a controlled substance;"

4. Title 21 U.S.C. Section 846, which states:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fined or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE CASE

The petitioner was charged in the United States District Court for the Western District of Oklahoma with the crime of

conspiring to distribute Dilaudid, a Schedule II Controlled Substance in violation of Title 21, U.S.C., Section 846. The style of the case was *United States of America, Plaintiff, v. Harold D. Behrens, James D. Wilkett, Sr., James M. Wilkett, Jr., Fred Weed, Thomas H. Conklin, Jr., D.O., Joe Hoover, R. Ph., and Harvey Lee Mize, Defendants,* Criminal Number 80-147-T. The petitioner herein was found guilty by the jury on the one count indictment charging the violations of Title 21, U.S.C. Sections 841(a)(1) and 846, and petitioner was sentenced to fifteen (15) years imprisonment. This judgment and sentence was affirmed by the Court of Appeals for the Tenth Circuit, *United States of America v. Harold D. Behrens, James D. Wilkett, James M. Wilkett, and Fred Weed,* Numbers 81-1086, 81-1187, 81-1186, and 81-1253 on September 9, 1982. Petitioner is presently serving a fifteen (15) year sentence for his conviction, the trial judge and the Tenth Circuit having denied appeal bond to the petitioner.

B. RELEVANT FACTS CONCERNING THE PETITIONER'S CONVICTION FOR CONSPIRACY

The petitioner in this case was charged with numerous co-defendants for conspiring to distribute Dilaudid, a Schedule II Narcotic Controlled Substance. It was alleged that the petitioner was the recipiant of prescriptions for the Dilaudid written by Dr. Thomas Conklin, and filled by Joe Hoover, a registered pharmacist. The petitioner herein then would sell the drug to James Logan Powell, an unindicted co-conspirator, and Harold Dean Behrens who was indicted with the petitioner. Powell and Behrens would then distribute the drug to various people in Oklahoma City, Oklahoma.

At the time of the trial, the petitioner's co-defendant Behrens was charged with a triple homicide which allegedly arose out of the co-defendant Behrens' drug trafficking operations in Oklahoma City. The petitioner herein, along with the other co-defendants, timely moved for a severance from the co-defendant Behrens due to potential prejudice arising out of the publicity engendered by the triple homicide. The trial court declined to sever the petitioner herein from the co-defendant Behrens prior to trial. The petitioner herein also moved for disclosure of any exculpatory material under *Brady v. Maryland,* 373 U.S. 83 (1963), which the prosecution might have. The trial court

sustained that motion, directing the prosecution to provide the petitioner herein with all exculpatory material. The case proceeded to trial, and at the close of the second day of trial the prosecution provided a voluminous amount of material to the petitioner consisting primarily of grand jury testimony and FBI investigative reports which documented that the source of the Dilaudid being distributed in Oklahoma City was elsewhere than Stigler, Oklahoma, the residence of the petitioner herein and co-defendants Conklin and Hoover.

The prosecution originally had planned to call as witnesses the parties who had testified before the grand jury as to the source of the Dilaudid, but did not, in fact, call those witnesses at trial due to procedural difficulties. The reason that the prosecution did not call the witnesses whose testimony before the grand jury, and statements to the FBI, was that the source of their information as to the source of the Dilaudid was one of the victims in the triple homicide. The trial judge further determined that any such reference would force the trial judge to declare a mistrial on the case. As a consequence, neither the prosecution, nor the petitioner herein presented any evidence to the jury that the source of the Dilaudid was elsewhere than Stigler, Oklahoma.

During the course of the trial, the trial court also determined that the conspiracy involving Dr. Conklin and Joe Hoover, the pharmacist, was separate and distinct from the conspiracy charged, and consequently severed the Defendants Hoover and Conklin from the trial due to the lack of proper venue over them in the Western District of Oklahoma.

The petitioner herein moved for a mistrial on the ground that the failure to timely produce the *Brady* material, combined with the prejudicial joinder with co-defendant Behrens, precluded the petitioner from bringing to the jury's attention exculpatory material showing that the source of the drugs distributed in Oklahoma was from some place other than Stigler, Oklahoma. The petitioner herein also moved to dismiss the indictment after Hoover and Conklin were severed on the ground that the evidence showed, and the trial court found, the existence of more than one conspiracy, thus leading to a classic material variance under *Kotteakos v. United States*, 328 U.S. 750 (1946). The

district court merely considered this motion at the close of the case along with the usual Motion for Judgement of Acquittal, and overruled all of the petitioner's motions.

On appeal the United States Court of Appeals for the Tenth Circuit determined that the petitioner's argument as regarded the material variance was incorrect as there was only one conspiracy, and further ruled that since the prosecution provided the *Brady* material during trial the petitioiner herein suffered no prejudice. The Court of Appeals therefore affirmed the judgment of the trial court. Petitioner herein did not petition the Tenth Circuit for a rehearing.

EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted in the District Court for the Western District of Oklahoma of one count of conspiring to distribute a Schedule II Controlled Substance under Title 21, Sections 841(a)(1) and 846.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided federal questions in a way in conflict with the applicable decisions of this Court.

I. THE TENTH CIRCUIT'S DECISION UPHOLDING THE TRIAL COURT'S REFUSAL TO GRANT PETITIONER'S REQUEST FOR A MISTRIAL IS IN CONFLICT WITH THIS COURT'S DECISIONS.

The petitioner herein was charged with having conspired to distribute Dilaudid, a Schedule II Narcotic Controlled Substance. The basis for the charge was that the petitioner herein would receive Dilaudid from a pharmacist in Stigler, Oklahoma, with prescriptions written to the petitioner from a doctor in Stigler, Oklahoma. The petitioner herein, the doctor, and the pharmacist were all residents of Stigler, Oklahoma, which lies within the venue of the United States District Court for the Eastern District of Oklahoma. The petitioner herein would then deliver the Dilaudid to James Logan Powell, an unindicted co-conspirator who was the government's primary witness, and Harold Dean Behrens, who was indicted along with the

petitioner. Behrens and Powell would then distribute the drug in Oklahoma City, Oklahoma, wherein lies the venue for the United States District Court for the Western District of Oklahoma. On November 6, 1980, the trial court entered an order sustaining the petitioner's request for the production of exculpatory material under *Brady*. At the close of the second day of trial the prosecution provided the petitioner with grand jury testimony and FBI reports of the prosecution's remaining witnesses which had not yet been called. This material, which the prosecution erroneously treated as *Jenks Act Material*, 28 U.S.C. Section 3500, contained repeated references to the fact that the Dilaudid which Behrens was distributing in Oklahoma City was coming from Texas. In none of the testimony to the grand jury, or the FBI and police reports, was there any mention that the source of the Dilaudid was Stigler, Oklahoma. Unfortunately, the witnesses who had testified before the grand jury, and whom the prosecution intended to call to testify against the petitioner had learned about the Dilaudid distribution from one Raymond Peters. At the time of petitioner's trial, Peters an unindicted co-conspirator, had allegedly been murdered by petitioner's co-defendant Behrens along with two other victims. The triple homicide, for which co-defendant Behrens was later convicted, had garnered a great deal of adverse pre-trial publicity, and had, in fact, been the basis for a pre-trial motion to sever on behalf of the petitioner herein. As the trial court had refused to grant the severance, it ruled that any reference to the triple homicide in petitioner's trial would mandate the trial court's ordering a mistrial.

The problem confronting the trial court, and indeed the petitioner herein, became apparent during the testimony of one Marcia Lynn Widner whose testimony was based upon conversations with Peters. The district court correctly noted that the petitioner herein, and the other defendants, would be unable to cross-examine Widner without reference to the triple murder, and consequently struck her testimony. The prosecution then rested its case declining to call its other witnesses who were the source of exculpatory material provided to the petitioner at the close of the second day of trial. As the petitioner herein could not call those same witnesses without inviting error, thus mandating

a mistrial, the petitioner herein was wholly precluded from bringing the exculpatory evidence before the jury. At that juncture, the petitioner moved for a mistrial.

The basis for the petitioner's mistrial due to the failure to timely provide the exculpatory material was based upon the fact that had the *Brady* material been furnished prior to trial, the petitioner herein could have reurged his Motion for Severance from the co-defendant Behrens. Obviously, had the petitioner herein not been forced to stand trial with co-defendant Behrens the exculpatory evidence could have been brought before the jury.

The Tenth Circuit dismissed the petitioner's *Brady* argument on the ground that *Brady* is not violated when the *Brady* material is made available to the defendants during a trial, citing *United States v. Alberico*, 604 F.2d 1315 (10th Cir. 1979) *cert. denied.* 444 U.S. 992 (1979). Assuming arguendo that such an interpretation of *Brady* is correct, the petitioner herein would assert that it was the combination of the failure to provide the *Brady* material prior to trial with the prejudicial joinder with co-defendant Behrens that deprived him of a fair trial. Petitioner herein could not, without inviting error, place the *Brady* material before the jury. As such, it was fundamentally wrong to allow the prosecution to disregard the trial court's order to produce the *Brady* material prior to trial. Had the *Brady* material been timely produced, there can be no doubt that the petitioner herein would have reurged his Motion to Sever from Defendant Behrens, and that such a motion would have been sustained by the trial judge. The Petitioner herein would submit that by refusing to provide the *Brady* material prior to trial the prosecution was able to circumvent the very spirit and letter of *Brady*. If the Tenth Circuit's interpretation of *Brady* is correct, the prosecution need only deliver *Brady* material during the trial of an accused. In the realm of conspiracy cases more often than not, defendants will be precluded from using the exculpatory material in their defense. Petitioner would submit that such is certainly not within the spirit or the letter of *Brady*. In any event, the failure of the government to timely provide the *Brady* material in the petitioner's case is analogous to the situation where the prosecution never presents *Brady* material without inviting error

and a mistrial is no different from the situation where the *Brady* material is never brought forth.

II. THE TENTH CIRCUIT'S AFFIRMATION OF THE TRIAL COURT'S REFUSAL TO DISMISS THE CASE AGAINST THE PETITIONER DUE TO A PREJUDICIAL VARIANCE IS IN CONFLICT WITH THIS COURT'S DECISIONS.

During the course of petitioner's trial, it became obvious and apparent that the evidence showed the existence of more than one conspiracy. Further, the evidence showed the existence of conspiracies of which the petitioner was not charged. The trial court determined that there was more than one conspiracy at the time that it severed the petitioner's co-defendants Conklin and Hoover. As stated by the district court in its order dismissing Hoover and Conklin:

> "When, as here, a single conspiracy has been charged and the evidence show the existence of two separate conspiracies, there are at least two courses opened to the court. In *United States v. Butler*, 494 F.2d 1246 (10th Cir. 1974), the tenth circuit outlined the possibilities: (1) The trial may continue against all defendants with cautionary instructions to the jury regarding the multiple conspiracies, or (2) when the prejudice to some defendants from the spillover evidence where the possibility of guilt by association cannot be cured by cautionary instructions, the court may require the government to elect against which defendants it chooses to proceed and the remainder severed for separate trial."

The district court did, in fact, sever the co-defendants Hoover and Conklin on the basis that the evidence documented the existence of more than one conspiracy. At that juncture, the petitioner herein moved to dismiss the indictment against him on the basis of *Koetteakos v. United States*, 328 U.S. 750 (1946). As herein above noted, the district court declined to dismiss the indictment against the petitioner at the close of the trial. On appeal, the United States Court of Appeals for the Tenth Circuit determined that the trial judge concluded that all of the activity

constituted one conspiracy to sell Dilaudid illegally for resale upon the street. Nonetheless, the Tenth Circuit acknowledged that at least one separate conspiracy was proven at trial, which mandated the district court's severance of Hoover and Conklin from the trial. As this Court has heretofore held, the issue is not whether there has been a variance in the proof, but whether there has been such a variance as to effect the substantial rights of the accused.

At the trial of this case the petitioner herein admitted that he had received prescriptions filled by Hoover and written by Conklin. The petitioner herein testified that he used the Dilaudid both for personal medical reasons, and to dope his racehorses. The trial court and the court of appeals concluded that this conspiracy was "the racehorse conspiracy".

On appeal the petitioner herein argued that the evidence at trial documented the existence of numerous conspiracies, with the petitioner herein lacking involvement in some of the conspiracies. The petitioner herein asserted on appeal that the evidence documented the following conspiracies.

1. The racehorse conspiracy between the petitioner, Hoover and Conklin.
2. A separate conspiracy between the petitioner and James Logan Powell, an unindicted co-conspirator, and Harold Dean Behrens whereby the petitioner allegedly delivered Dilaudid to Powell and Behrens.
3. Numerous conspiracies involving the distribution of Dilaudid in Oklahoma City by Powell, Behrens, and co-defendant Fred Weed.

No evidence was presented at trial linking the petitioner herein to the Oklahoma City distribution of Dilaudid. The court of appeals determined that the trial court determined that there was one conspiracy to sell Dilaudid illegally for resale on the streets, and that the petitioner herein would be held accountable for that conspiracy. Nonetheless, the simple fact of the matter is that the trial court determined and the appeals court noted, that at least two conspiracies were present. Further, that the existence of more than one conspiracy mandated the severance of Hoover and Conklin.

It is crucial to note, however, that the government alleged that the initial source of the Dilaudid was Hoover and Conklin. The government, therefore, based its indictment on a theory of one conspiracy with its roots in Stigler, Oklahoma. The trial court, and the court of appeals, found that Hoover and Conklin's involvement was in the racehorse conspiracy, and that it was a separate conspiracy from the one proven against the petitioner. Even so, the only evidence presented which linked the petitioner to Dilaudid was, by necessity, the racehorse conspiracy with which the petitioner herein admitted being involved. It is important to note, that as hereinabove noted, no evidence was presented linking the petitioner herein to the distribution of Dilaudid in Oklahoma City. In effect, then, the petitioner was convicted for a street sale conspiracy on the basis of evidence presented in support of the racehorse conspiracy.

As set forth in the hereinabove discussion of the failure to timely provide the exculpatory information, exculpatory evidence existed which documented that the source of the Dilaudid being distributed in Oklahoma City was from a source other than Stigler, Oklahoma. The petitioner herein was, however, precluded from bringing this evidence before the jury.

The simple fact of the matter is that one conspiracy was alleged against the petitioner, and at least two were proven to have existed by the evidence presented against the petitioner at trial. Further, the evidence of the racehorse conspiracy, which was the only evidence linking the petitioner herein with Dilaudid, was crucial evidence required by the prosecution to gain a conviction against the petitioner. Thus, the petitioner was found guilty of a street sale conspiracy on the evidence of an admittedly separate and distinct conspiracy, which was so separate and distinct as to mandate the district court severance of Hoover and Conklin. Compounding the prejudicial effect to the petitioner herein was his inability to present the exculpatory evidence to the jury showing no involvement in the Oklahoma City street sale conspiracy, as the source of the Dilaudid distributed in Oklahoma City was from some place other than Stigler.

As such, the petitioner herein would assert that it was clearly erroneous for the court of appeals to affirm the district court conviction in apparent total disregard of this court's holding in *Kotteakos v. United States*, 328 U.S. 750 (1946).

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit is obviously a strained attempt to distinguish or circumvent this Court's holdings in both *Brady v. Maryland* and *Kotteakos v. United States*. As petitioner has hereinabove asserted, the failure to timely provide exculpatory information, and the existence of a prejudicial variance are inextricably interwoven. The court of appeals attempt to circumvent both *Brady* and *Kotteakos*, cannot and must not be allowed by this Honorable Court.

For the reasons hereinabove stated, the petitioner requests a Writ of Certiorari be granted.

Respectfully submitted,

John B. Estes
Counsel of Record
Gene Stipe
Mitchell A. Lee
Stipe, Gossett, Stipe Harper & Estes
P.O. Box 53567
Oklahoma City, Oklahoma 73152
(405) 524-2268

Attorneys for the Petitioner